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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1952

No. 648

JAMES AVERY,

Petitioner,

VS.

STATE OF GEORGIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Georgia

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Supreme Court of Georgia (R. 45) is reported in 209 Ga. 116; 70 S.E. 2d 716.

JURISDICTION

The jurisdiction of this Court is invoked by petitioner under §1257 and §2101, Title 28 U.S.C.

STATUTES INVOLVED

The petitioner does not question the constitutionality of any statute, but contends that the action of officers under valid State statutes denied him a fair trial and denied him due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment.

STATEMENT

James A. Avery, the petitioner, was tried in the Superior Court of Fulton County, Georgia, found guilty of rape and sentenced to be electrocuted. The Supreme Court of Georgia affirmed this conviction. *Avery vs. State*, 209 Ga. 116, 70 S.E. 2d 716. Petitioner would have this Court reverse the judgment of the Supreme Court of Georgia solely because of alleged errors in its decision having to do with the procedure followed in the impaneling of the trial jury which returned the verdict of guilty. (Petition, p. 19).

The indictment in the case at bar was returned by the grand jury of Walker County, Georgia, to the Superior Court of that County. (R. 1). A change of venue was granted (*Avery v. State*, 83 Ga. App. 700, 64 S.E. 2d 589) to Fulton County where trial was had. At the time of trial the petitioner filed timely written challenge to the array of traverse jurors put upon him (R. 39). By this pleading numerous objections were made to the manner in which the jurors put upon him were selected and impaneled. Many of these objections are no longer in issue. The State demurred and moved to strike the challenge to the array (R. 10). This demurrer was sustained in part and Paragraphs 1 through 6 of the challenge accordingly stricken (R. 15). Paragraphs 7 through 11 inclusive of the challenge were deemed by the trial judge to state good grounds of challenge to the array of jurors and the demurrer as to those paragraphs was in consequence overruled (R. 13). The State then traversed the allegations of fact contained in the challenge to the array (R. 11) and the trial judge received evidence upon the issues of fact thus made. After receiving evidence, the challenge to the array was overruled by order (R. 91) which did not contain express findings upon

any of these issues of fact.

According to the evidence received upon this preliminary issue the panels of jurors tendered and challenged were selected from a jury list revised by the Jury Commissioners of Fulton County over a period of approximately eleven months from August, 1948 to July 25, 1949 (R. 26-27). In making this revision the Commissioners first had a group of clerical assistants to examine all original property tax returns which were obtained from the Tax Receiver's office in the form of bound volumes. For each such return a card was prepared containing the name and address of the taxpayer and other information deemed useful. (R. 21). There were 122,771 taxpayers making returns for which such cards were made. (R. 27). The Jury Commission studied each of these cards and, based upon the information which they contained, selected the names of certain taxpayers to be included in the traverse jury list. By statute County Tax Receivers in Georgia have, for more than fifty years, been required to make separate alphabetical lists of white and colored taxpayers. Ga. Code § 92-6307, (Appendix, p. 16). The printed forms on which tax returns are made are printed upon white and yellow paper and colored taxpayers make their returns upon those forms printed on yellow paper. The clerical employees of the Jury Commissioners obtained much of their data from these tax returns. (R. 21). George A. Campbell, who served as a member of the Board of Jury Commissioners for the period in question was presented as a witness by petitioner and in describing this procedure stated: (R. 15)

> "... we take the digest which is separate and has yellow sheets and make the cards for the

jury box in the same color as in the tax digest . . ."

After all of the cards had been examined and selection completed, those names selected to compose the jury list were transmitted to the printer, who set the list in type and returned page proofs to the Jury Commissioners. The page proofs were carefully checked and verified by the commissioners. From the corrected proof the printer printed four copies of the list of traverse jurors having the names thereon so arranged and so spaced that the list may be cut up into cards, each containing the name and address of a single juror. Three of the four printed lists were cut into such tickets and by the commissioners placed in the jury boxes for the Superior Court, the Civil Court of Fulton County and the Criminal Court of Fulton County. On all printed lists the names of all colored jurors were printed on yellow sheets of heavy paper stock. This was done at the instruction of the C. rk of the Superior Court who is Ex Officio Clerk of the Board of Jury Commissioners. (R. 23). Copy of the printed list is bound, certified, and filed in the office of the Clerk. (R. 22). It has been the practice in Fulton County to print the names of Negro jurors on yellow tickets and those of white jurors on white tickets for fifty years or more and no witness knew why that custom was started. (R. 14, 15, 30).

The procedure followed in drawing from the jury box the names of the jurors who were formed into the panels here challenged was described by Judge Virlyn Moore, Presiding Judge of the Superior Court of Fulton County, (R. 28-32), who was sworn as a witness on behalf of petitioner. The statutory plan for the selection of jurors, Ga. Code, Title 59, requires that a jury box be provided which contains two compartments

marked "one" and "two". The Jury Commissioners must place therein tickets containing the names of the jurors. Ga. Code, § 59-108, (Appendix, p. 14). When a jury is drawn by a Judge the seal on the jury box is broken and tickets are taken from the compartment numbered "one" and after being listed are deposited in compartment numbered "two". When all names have in this manner been drawn from compartment numbered "one", then the procedure is reversed. Ga. Code, § 59-230, Ga. Code § 59-701, (Appendix, p. 15). Judge Moore in substance testified that as the Judge in Chambers during the month of August, 1951, he drew the jury put upon the accused at his trial in September, 1951, which was the subject of this challenge to the array. (R. 28). It was his practice to reach down into the box and without choosing or selecting, pick up several tickets and deposit them in a cigar box numbered 1. After forty or fifty tickets have been placed by him in this cigar box, they are handed to a Deputy Sheriff, who in turn passes them to a Deputy Clerk for listing. When these names have been copied upon a list, they are deposited in a cigar box numbered 2 and thereby returned to the compartment of the jury box numbered "two". (R. 28-32). This witness stated:

> ". . . I didn't make any selection as to white and yellow slips. Absolutely none. I have never at any time in drawing a jury in this county made any selection as to whether they were white persons or colored persons that were in the box. I have been Judge of this court—on my 25th year now. I have petit jurors that are colored here in court. Sometimes we have an entire panel or more. I think it was five colored grand jurors last

> time here. It is common practice for both colored and white to serve on the jury. It certainly is, it occurs very often . . ." (R. 31).

The order entered by the trial judge at the conclusion of the evidence was:

> "Upon hearing the evidence offered in support of the within challenge to the array, it is ordered that said challenge to the array be and the same is hereby overruled." (R. 9).

SUMMARY OF ARGUMENT

Respondent contends that:

1. Petitioner's case must be restricted to questions presented as set out in his petition for certiorari.

2. The use of colored tickets does not, of itself, accomplish discrimination and is not calculated to accomplish universal discrimination against Negro litigants.

3. Petitioner cannot here complain of discriminatory practices which have not been presented to the trial court or to the Supreme Court of Georgia by pleading or proof.

4. A decision of the trial judge on issues of fact, fairly made and supported by substantial evidence, will be conclusive on appeal in the Supreme Court of Georgia and in this Court.

5. Proof fails to establish that petitioner has, in this case, been denied any constitutionally guaranteed right with respect to the jury put upon him.

ARGUMENT AND CITATION OF AUTHORITIES

The petition for certiorari contains no assignment of errors or specification of errors as such. In the

petition two questions are said to be presented. (Petition, p. 19. Brief in support of petition, p. 25-26). By the two questions thus stated, petitioner apparently limited his attack upon the jury selection procedure followed in the trial court to the method by which the panel of jurors were drawn from the jury box. Other grounds of objection have apparently been expressly abandoned. (Petition, p. 15). Since certiorari was granted upon this petition and since the case has been calendared for argument upon the summary docket, we will restrict our brief to an argument of the points thus made. We do this upon the assumption that both the petitioner and this Court deem those points important and controlling. We further understand the rule of this Court to be that "Only the questions specifically brought forward by the petition for writ of certiorari will be considered." U. S. Sup. Ct. Rule 38, 28 U.S.C.A.; *National Licorice Co. v. National Labor Relations Board*, 309 U. S. 350, 357.

Petitioner's challenge to the array of jurors as filed in the trial court was authorized by Ga. Code § 59-803, (Appendix, p. 15). The Supreme Court of Georgia has clearly pointed out that, under that statute, the trial judge must determine all issues of fact made upon such a challenge. *Harris v. State*, 191 Ga. 243, 256. The Supreme Court of Georgia will not disturb the trial judge's determination of issues of fact when such determination is supported by evidence. *Wilson v. State*, 69 Ga. 224, 238. By the terms of Georgia's Constitution its Supreme Court is a court for the correction of errors of law only. Constitution of Georgia, 1945, Art. VI, § II, ¶ IV (Ga. Code Ann. § 2-3704). This constitutional provision denies to the Supreme Court of Georgia jurisdiction and power to correct errors of fact. *Merritt v. State*, 190 Ga. 81, 87; *Mills v. State*,

188 Ga. 616, 623; *Smithwick v. State*, 199 Ga. 292, 304. The trial judge's decision was tantamount to a finding of fact that no discrimination was accomplished against colored persons in the selection of a jury. We submit that this decision was amply supported by evidence and should not be disturbed. This we understand to be the rule established by this Court. *Thomas v. Texas*, 212 U. S. 278, 282. Also see, *Cassell v. Texas*, 339 U. S. 282, concurring opinion of Mr. Justice Frankfurter, at pages 291, 292.

We may lay to one side those cases in which no Negroes had served upon juries over a long period of time. (*Neal v. Delaware*, 103 U. S. 370; *Norris v. Alabama*, 294 U. S. 587; *Hollins v. Oklahoma*, 295 U. S. 394; *Hale v. Kentucky*, 303 U. S. 613; *Pierre v. Louisiana*, 306 U. S. 354; *Patton v. Mississippi*, 332 U. S. 463). The record here shows that Negroes frequently serve on both grand and petit juries. (R. 31).

Indeed, within the four corners of this record *it does not appear whether Negroes were on the panels put upon petitioner.*

We do not understand petitioner to contend that the Fourteenth Amendment accords him the right to have Negroes upon the jury which tries him or to have Negroes upon the panels put upon him so long as there has been a fair and legal selection. Indeed, he could not so contend under this Court's decisions in *Martin v. Texas*, 200 U. S. 316, 321; *Virginia v. Rives*, 100 U. S. 313, 323; and *Neal v. Delaware*, 103 U. S. 370, 394.

Petitioner pretends to see in the practice of using different colored tickets a system which can be utilized to discriminate against all Negro litigants. Petitioner appears to claim no discrimination aimed individually

at himself, but claims that he shares the discrimination leveled against all litigants of his race. (Petition, p. 15). Mr. Justice Candler of the Georgia Supreme Court (R. 52, bottom of page) expresses the view that proof of this practice without more establishes a prima facie case of discrimination sufficient to require a reversal. This view of the matter is apparently shared by all other Justices of that Court. Despite this unanimity we must respectfully state that we do not see how the practice could be so utilized to accomplish universal discrimination. If the purpose be to reduce the number of Negro jurors selected on every occasion when panels of jurors are drawn then it would be necessary to ignore another statute. Georgia Code § 59-203 (Appendix, p. 14) provides that in impaneling grand jurors the ". . . judges of the Superior Courts . . . shall cause to be drawn from compartment number 'one' . . . names to serve as grand jurors . . . and *when all names shall have been drawn out of compartment number 'one'* then the drawing shall commence from compartment number 'two'." (Emphasis supplied). Georgia Code § 59-701 (Appendix, p. 15) provides that petit jurors shall be drawn in the same manner. So long as these statutes are observed, the colored card device is not an instrument by which Negro litigants may all be discriminated against. If the practice of deliberate selection of white jurors only is followed, then ultimately only yellow colored tickets will remain in the compartment from which the jury panels are required to be drawn. If there has been violation of these statutes there is no proof of it in this record. It is a matter susceptible of inquiry and we submit that there should be no reversal here upon assumption without proof.

At page 2 of the petition for certiorari able counsel

for the petitioner has sought to show in tabular form what he fancies to be the progressive effect of systematic exclusion of colored persons from the jury. On the last line of this table it is represented that all of the jurors, sixty in number, comprising the panels from which the jury in this case was struck, were white persons. It is argued that this result could be achieved only by an unfair and discriminatory selection procedure.

Respondent respectfully submits that even if this table be factually correct, and the record is wholly silent as to the race of the jurors in the questioned panels, then it still falls short of demonstrating that discrimination which petitioner charges in his assignment of error. In the statement of the questions presented (R. 18-19) petitioner limits his case here to the complaint that jurors were drawn from a jury box containing the yellow and white tickets which have been described. We are left by this record wholly uninformed as to the racial proportion resulting from the drawing of these panels of jurors. We may not even determine with precision how many jurors were drawn. Judge Moore testified that it was customary to draw from one hundred fifty to two hundred jurors for each division of the Superior Court or a total of from three hundred to four hundred traverse jurors. (R. 28). He also testified:

> "I have petit jurors that are colored here in Court . . ."

If this Court concludes that the use of colored tickets resulted in the drawing of a disproportionate number of colored jurors it must of necessity do so in a factual vacuum.

The method of organizing jurors into panels of twelve is not prescribed by Georgia statute. We are

not enlightened as to the method followed here. From the nature of the task it cannot be done when the jurors are drawn from the jury box or until they are present in court and those who are to serve become known. Petitioner's argument at pages 32 and 33 of his brief in support of petition for certiorari, that the use of colored tickets facilitates an improper grouping of Negro jurors in panels fails for want of evidence that there was discrimination in this manner. The further argument that the five panels put upon petitioner were illegally chosen finds no evidentiary support nor was challenge made for this cause. We submit that without pleading and evidence no reversal can be had upon that ground. Furthermore, the point has not been decided by the highest court of Georgia empowered to decide it.

We come at last to a discussion of this Court's recent decision in *Speller v. Allen*, 73 S. Ct. 397, 419. Petitioner recognizes the weight of this decision against him and devotes his supplemental brief to an elaborate effort to distinguish that case from the case at bar. Respondent will make no effort to match this detailed effort at comparison. Respondent does, however, rely upon the principles announced in that case at page 419 of the report cited. Respondent contends that here, as there, the proof fell far short of establishing that purposeful non-inclusion of Negroes on account of race which has been so often condemned by this Court. Here, petitioner seeks reversal of the Supreme Court of Georgia's decision because the tickets of Negro jurors included in the jury box were upon yellow paper as distinguished from the white paper upon which the names of other jurors were printed. The clear and undisputed evidence showed that this visible difference was ignored when drawing names from the box. In the

Speller case, supra, the scrolls of Negroes identified by a dot or period were drawn from the box by a child deemed incapable of purposeful discrimination. We submit that no distinction can properly be made as between the drawing of jurors by a judge who refuses to discriminate and the drawing of such jurors by a child who does not know how to discriminate.

CONCLUSION

Based upon the foregoing argument and authorities we respectfully submit that the judgment of the Supreme Court of Georgia should be affirmed.

Respectfully submitted,
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APPENDIX

GA. CODE Sec. 59-101. *Jury commissioners; appointment; number; qualifications; terms; removal.*—There shall be a board of jury commissioners, composed of six discreet persons, who are not practicing attorneys at law nor county officers, who shall hold their appointment for six years, and who shall be appointed by the judge of the superior court. On the first appointment two shall be appointed for two years, two for four years, and two for six years, and their successors shall be appointed for six years. The judge shall have the right to remove said commissioners at any time, in his discretion, for cause, and appoint a successor: Provided, that no person shall be eligible or appointed to succeed himself as a member of said board of jury commissioners. (Acts 1878-9, p. 27; 1887, p. 52; 1901, p. 43; 1935, p. 151.)

GA. CODE Sec. 59-106. *Revision of jury lists. Selection of grand and traverse jurors.*—Biennially, or, if the judge of the superior court shall direct, triennially on the first Monday in August, or within 30 days thereafter, the board of jury commissioners shall revise the jury lists.

The jury commissioners shall select from the books of the tax receiver upright and intelligent men to serve as jurors, and shall write the names of the persons so selected on tickets. They shall select from these a sufficient number, not exceeding two-fifths of the whole number, of the most experienced, intelligent, and upright men to serve as grand jurors, whose names they shall write upon other tickets. The entire number first selected, including those afterwards selected as grand jurors, shall constitute the body of traverse jurors for the county, to be

drawn for service as provided by law, except that when in drawing juries a name which has already been drawn for the same term as a grand juror shall be drawn as a traverse juror, such name shall be returned to the box and another drawn in its stead. (Acts 1878-9, pp. 27, 34; 1887, p. 31; 1892, p. 61; 1899, p. 44.)

GA. CODE Sec. 59-108. *Jury boxes, how made up.*—The jury commissioners shall place the tickets containing the names of grand jurors in a box to be provided at the public expense, which box shall contain compartments marked number "one" and "two", from which grand jurors shall be drawn, and the jury commissioners shall place the tickets containing the names of traverse jurors in a separate box, from which traverse jurors shall be drawn. (Acts 1878-9, pp. 27, 34.)

GA. CODE Sec. 59-203. *Manner of drawing.*—The judges of the superior courts, at the close of each term, in open court, shall unlock the box, and break the seal, and cause to be drawn from compartment number "one" not less than 18 nor more than 30 names to serve as grand jurors at the next term of the court; all of which names shall be deposited in compartment number "two"; and when all the names shall have been drawn out of compartment number "one", then the drawing shall commence from compartment number "two", and the tickets be returned to number "one", and so on alternately; and no name so deposited in the box shall, on any pretense whatever, be thrown out of it, or destroyed, except when it shall be satisfactorily shown to the judge that the juror is dead, removed out of the county, or otherwise disqualified by law. (Acts 1869, p. 140; 1874, p. 20.)

GA. CODE Sec. 59-701. *How drawn and summoned.*—Petit juries shall be selected, and their names placed in a box, as provided in sections 59-106 and 59-108. At the same time, and in the same manner, that grand juries are drawn, the judge of the ~~superior~~ court shall draw out of the same compartment of the jury box 36 names to serve as petit jurors for the trial of civil and criminal cases; and such petit jurors shall be summoned in the same manner as is provided in section 59-206 for summoning grand jurors. (Acts 1869, pp. 139, 140; 1878-9, p. 27.)

GA. CODE Sec 59-801. *Panel of ~~48 jurors in~~ felony trials; tales jurors.*—When any person shall stand indicted for a felony, the court shall have impaneled 48 jurors, 24 of whom shall be taken from the two panels of petit jurors, from which to select the jury. When the regular panels of petit jurors, or either of them, cannot be furnished to make up panels of 48 for the trial of felonies, because of the absence of any of such panels, where they, or any part of them, are engaged in the consideration of a case the presiding judge shall cause said panels to be filled by summoning such numbers of persons, who are competent jurors, as may be necessary to make full the said panels. If the jury shall not be made up from said panel of 48, the court shall continue to furnish panels, consisting of such number of jurors as the court, in its discretion, may think proper, until a jury shall be obtained. In making up said panel of 48 jurors, or successive panels of any number, the presiding judge shall draw the tales jurors from the jury boxes of the county and order the sheriff to summon them. (Acts 1937, pp. 466, 468.)

GA. CODE Sec. 59-803. *Challenge to the array.*—The accused may, in writing, challenge the array for

any cause going to show that it was not fairly or properly impaneled, or ought not to be put upon him; the sufficiency of which challenge the court shall determine at once. If sustained, a new panel shall be ordered; if not sustained, the selection of jurors shall proceed. (Acts 1855-6, p. 230.)

GA. CODE Sec. 92-6307. *Entry on digest of names of colored persons.*—The tax receivers shall place the names of the colored taxpayers, in each militia district of the county, upon the tax digest in alphabetical order. Names of colored and white taxpayers shall be made out separately on the tax digest. (Acts 1894, p. 31.)

GA. CODE Sec. 92-6308. *Returns by receivers and collectors of taxes paid by colored people.*—The several receivers of tax returns and tax collectors in this State, or other officers performing similar duties, shall make a report to the Comptroller General of the character and amount of all taxes returned or paid by colored taxpayers in this State, and the Comptroller General in his annual report shall make a general exhibit of the character and amount of the taxes so returned. (Acts 1874, p. 109.)